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QUESTION PRESENTED

Amicus will address the following issue:

Whether, consistent with the principles of federalism articulated in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Congress or the federal courts may impose, in cases arising under the federal courts' diversity jurisdiction, a rule of evidence governing the admissibility of expert testimony that may be at variance with a forum state law.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-102

WILLIAM DAUBERT and JOYCE DAUBERT,
Individually and As Guardians Ad Litem for
JASON DAUBERT, and ANITA DE YOUNG, Individually
And As Guardian Ad Litem for ERIC SCHULLER,

Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law and policy center with more than 100,000 members throughout the United States. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. WLF has long been interested in the promotion of tort reform to ensure that the free-enterprise system is preserved.

To that end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts to urge the adoption of procedural rules that will minimize the likelihood that unwarranted tort liability will be assessed on the business community. *See, e.g., Burlington Northern Railroad Co. v. Ford*, 112 S. Ct. 2184 (1992); *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). WLF believes that the public interest is best served by a legal system that does not subvert the courts' truth-finding processes in a rush to provide compensation to all who have suffered injuries.

This brief will bring relevant authorities to the attention of the Court which may not be brought to the attention of the Court by the parties or by other *amici curiae*. Among other things, this brief will demonstrate that Congress and the federal courts may protect the integrity of the federal courts' truth-finding process by employing an evidentiary rule which excludes incompetent expert scientific testimony in civil diversity cases that would unduly prejudice or confuse a jury.[1] Such a rule does not violate principles of federalism because it is consistent with the power given the federal courts under Article III of the Constitution and does not infringe on any state's substantive policy or on any rights or obligations guaranteed by the states. *Amicus* has no other interest in the resolution of this case, political or economic.

WLF submits this brief in support of Respondent with the written consent of both parties. The written consents are on file with the Clerk of the Court.

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[1] Respondent convincingly demonstrates that the Federal Rules of Evidence incorporate the rule in *United States v. Frye*, 293 F.2d 1013 (D.C. Cir. 1923), which excludes incompetent so-called scientific evidence. This brief demonstrates that this exclusionary rule does not offend principles of federalism.

STATEMENT

In the interest of brevity, WLF adopts the Statement included in Respondent's brief.

SUMMARY OF ARGUMENT

The Ninth Circuit has followed the First, Fifth and District of Columbia Circuits and required that expert scientific testimony be based on "generally accepted" scientific principles to be admitted into evidence under Article VII of the Federal Rules of Evidence. This requirement, first enunciated in *United States v. Frye*, 293 F. 1013, 1014 (D.C. Cir. 1923), is intended to protect the integrity of the truth-finding process by excluding evidence that would unduly prejudice or mislead the jury or confuse the issues. This rule applies to all civil actions, and does not favor any class of people over any other, or impair the substantive policy of any state. Petitioners contend that the Ninth Circuit's adherence to this exclusionary rule violates the principles of federalism first articulated by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), because it is "outcome determinative" and impairs substantive rights guaranteed by the states. (Petitioners' Brief at 41.) This argument is fundamentally unsound.

Rules of evidence may be "outcome-determinative" in the sense that they assist the fact-finder to find the truth based on facts and not on conjecture, surmise, or emotional appeal. However, this effect in no way contravenes *Erie* principles. Indeed, to suggest that *Erie* and its progeny exclude all court rules that are "outcome determinative" would be to abrogate the Federal Rules of Evidence in diversity cases. *Erie* principles require no such result.

The federal government has a legitimate interest in ensuring that the federal judiciary operates as an independent and effective judicial system. Consistent with

this interest, the Constitution allows Congress and the federal courts to adopt their own rules of procedure in diversity actions as long as those rules do not impair substantive state policies. Necessarily, the interest of an independent and effective federal judiciary may conflict with federalism's interest in uniformity of outcome. This Court, since its decision in *Byrd v. Blue Ridge Rural Electric Coop.*, 356 U.S. 525 (1958), has resolved such conflicts by examining the policies behind the federal and state interests. It is only where the federal rule significantly impinges upon a state substantive policy that the federal procedural rule must yield -- even in the case of a judge-made rule.

Rules that assist the truth-finding process by excluding prejudicial or confusing evidence do not impinge on any important state substantive interest. If anything, federal and state interests are identical: to find the truth in the most fair and efficient manner possible. Isolated differences in outcome, derived from variations in approach, to ensure the existence of an independent federal judiciary, are not prohibited by *Erie*. The fact that state courts may approach the truth-finding process in slightly different ways from the federal courts in a given instance does not create a state-guaranteed right. *Byrd* allows the federal courts to follow the truth-seeking rules Congress or the federal court determine to be the best suited for this purpose. This Court has never required just results to give way in favor of uniform outcomes.

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

ARGUMENT

I. THE *FRYE* RULE IS A "TRUTH FINDING" RULE THAT DOES NOT IMPAIR THE SUBSTANTIVE LAW OF THE STATES

In the opinion below, the Ninth Circuit held that expert scientific testimony must be based on a methodology "generally accepted as a reliable technique among the scientific community." (Jt. App. at 238 (quoting *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir. 1985).) Petitioners' arguments notwithstanding, this rule, or indeed any other rule limiting the admissibility of expert testimony, does not violate the principles of federalism first articulated in *Erie Railroad Co. v. Tompkins*. This is true whether the Ninth Circuit's *Frye* Rule is considered a tool used in applying the standards of Article VII of the Federal Rules of Evidence or an independent judge-made rule.

During the debate over the proposed adoption of a federal evidence code, Judge Weinstein addressed the same federalism concerns raised by Petitioner. *See* J. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 Colum. L. Rev. 353 (1969) (hereinafter "*Uniformity-Conformity*"). Judge Weinstein drew distinctions between rules that are associated with state substantive policies and purely procedural or "truth-determining" rules. Examples of rules that are associated with substantive rights are burdens of proof, presumptions, and evidentiary privileges. These rules are substantive under *Erie* principles because they are deliberately designed by the states to "affect substantive rights by favoring either plaintiffs or defendants." *Uniformity-Conformity*, 69 Colum. L. Rev. at 363. Burdens of proof and presumptions are designed to reach a preferred result that is consistent with an important state policy.

Likewise, privileges represent state policy decisions that exclusion of probative evidence is necessary to

promote relationships the state deems important.[2] *Id.* at 370. These rules raise federalism concerns because expressed substantive policies of the states favoring these relationships would be overridden if in such cases federal courts followed their own policies.

Rules concerning expert and opinion testimony are different. These rules do not promote relationships or favor one class of persons over another. They are designed to promote fairness and efficiency in the court's truth-finding function.[3] As such, they do not impair state substantive rights. If anything, the federal and the state policies are identical -- to find the truth.

Since there are no legitimate overriding state concerns, the federal courts should be allowed to apply the procedural rule they determine is best suited to the federal system of justice. *See* R. Degnan, *The Law of Federal Evidence Reform*, 87 Harv, L. Rev. 275, 298 (hereinafter, "*Evidence Reform*") ("Absent any applicable state policy, even occasional and unpredictable differences in outcome will not give offense to a state when the reason they occur is that superior fact finding machinery produced a closer approximation of truth than state processes were deemed capable of providing."); *cf. Haddigan v. Harkins*, 441 F.2d 844, 851-52 (3d Cir. 1970).

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[2] Such preferred relationships include husband-wife, attorney-client, and priest-penitent relationships. *See Uniformity-Conformity*, 69 Colum. L. Rev. at 370.

[3] As Judge Weinstein writes, rules controlling expert testimony are "clearly amenable to uniform treatment through federal rules of evidence. The hypothesis is that all of the rules are designed to achieve the same result, and divergence between state and federal practice is due only to some disagreement about which will achieve the better result in most cases." *Uniformity-Conformity*, 69 Colum. L. Rev. at 361. While some differences in outcome are inevitable, Judge Weinstein concludes that these must be ignored, "if the federal courts are to operate as an independent system with an integrity of its own." *Id.*

In *Byrd*, this Court acknowledged that uniformity of outcome is not the sole consideration under *Erie*. When "other considerations" such as the independence of the federal judiciary are present, this uniformity of outcome must give way. *Byrd*, 356 U.S. at 539. This is the case here.

II. THE *ERIE* DOCTRINE DOES NOT LIMIT CONGRESS'S POWER TO PROMULGATE PROCEDURE AND "TRUTH DETERMINING" RULES OF EVIDENCE THAT DO NOT IMPAIR SUBSTANTIVE STATE POLICIES

The federal courts may use the *Frye* Rule as a tool to apply the standards in Article VII of the Federal Rules of Evidence consistent with this Court's *Erie* jurisprudence.[4] Petitioners contend that Congress intended to exclude the *Frye* Rule from the Federal Rules of Evidence because Congress did not intend to infringe on substantive state rights and meant only to enact rules that did not tamper with state substantive policies. (Petitioners' Brief at 41-42.) This argument fails because the *Frye* Rule does not infringe upon substantive state policies.

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[4] There is substantial support for this position. *See United States v. Abel*, 469 U.S. 45, 51 (1984) (Court may look to pre-1975 decisions for guidance in interpreting Federal Rules of Evidence). The District Court used the principles of the *Frye* Rule in interpreting Fed. R. Evid. 703 and Fed. R. Evid. 403, finding that scientific evidence not "reasonably relied upon by experts in a particular field" should be excluded because evidence lacking this foundation would not be helpful and would confuse or mislead the jury. (Jt. App. at 229).

Other courts have followed this approach. *See, e.g., Richardson by Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989) (expert testimony based on theory not generally accepted lacked adequate foundation under Fed. R. Evid. 703); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 311-15 (5th Cir. 1987), *mod.*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990) (scientific speculation unconfirmed by epidemiological proof excluded under Fed. R. Evid. 703 and 402); *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190, 1194 (1st Cir. 1987) (inadequate foundation under Fed. R. Evid. 703).

A. Congress Did Not Consider Rules Governing the Admission of Expert Testimony To Be Substantive

Congress obviously did not believe that rules governing opinion testimony infringed on state substantive law. Expert testimony may be excluded under Article VII for a variety of reasons: if the opinion is not rationally based on the perception of a witness and is not helpful (Fed. R. Evid. 701); if the Court concludes the witness is unqualified (Fed. R. Evid. 702); if the Court determines the evidence will not assist the trier of fact to understand evidence or determine a fact in issue (Fed. R. Evid. 702); or, if there is no foundation for the opinion (Fed. R. Evid. 703). The Court also may exclude expert testimony if it determines it will not tend to make the existence of any fact of consequence to determination of the action more probable than not (Fed. R. Evid. 401). When Congress determined that the proposed evidentiary rules impinged upon State substantive policies, it rejected the proposed rules. Congress did so in three cases: Fed. R. Evid. 302 (presumptions), Fed. R. Evid. 501 (privilege) and Fed. R. Evid. 601 (competency of witnesses).[5]

Congress's acceptance of Article VII supports the conclusion that rules limiting expert testimony are not substantive *per se* in Congress's view. As Judge Weinstein points out, these truth-determining rules are procedural because they do not impair state substantive policies. *See Uniformity-Conformity*, 69 Colum. L. Rev. at 363.

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[5] In each instance, under diversity jurisdiction, the federal courts apply state law. In federal question cases, the courts are directed to apply general federal common law. *See* Fed. R. Evid. 501; *see also* C. Wright, *Law of Federal Courts* § 93, at 625-26 (1983).

B. The Federal Rules of Evidence May Override State Rules of Admissibility

Unlike other federal procedural rules, Congress adopted the Federal Rules of Evidence by statute. *See* Act of January 2, 1975, Pub. L. 93-595, 88 Stat. 1926 (1975). Accordingly, the Federal Rules of Evidence are not subject to the Rules of Decision Act, 28 U.S.C. § 1652, or the Rules Enabling Act, 28 U.S.C. § 2072. The Federal Rules of Evidence are judged under Article III of the Constitution and the Necessary and Proper Clause. As this Court stated in *Hanna v. Plumer*, 380 U.S. 460 (1965):

> The constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it Congressional power to make rules governing the practices and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification of either.

Hanna, 380 U.S. at 472. Since the Federal Rules of Evidence can be rationally viewed as rules of procedure, they are "unquestionably valid." O. Wellborn, III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 Tex. L. Rev. 371, 398 (1977) (hereinafter, "*Federal Rules*").

Congress always has had the power to determine which evidence can be admitted in the federal courts. *See Tot v. United States*, 319 U.S. 463, 467 (1943). The Federal Rules of Evidence have been uniformly held to control in diversity cases. *See Forrestal v. Magendantz*, 848 F.2d 303, 305 (1st Cir. 1988) ("exclusion or admission of [expert] testimony is governed by the Federal Rules of Evidence in diversity cases"); *Salas by Salas v. Wang*, 846 F.2d 897 (3rd Cir. 1988); *Bushman v. Halm*, 798 F.2d 651, 660 n.6 (3rd Cir. 1986); ("it is axiomatic that admissibility of expert opinion is governed by the Federal Rules of Evidence"); *Garwood v. International*

Paper Co., 666 F.2d 217, 223 (5th Cir. 1982) (Federal Rules of Evidence govern admission or exclusion of expert testimony; reliance on state authority is misplaced).

Petitioners argue that the so-called "outcome-determinative" effect of the *Frye* Rule militates against interpreting the Federal Rules of Evidence as incorporating *Frye*. They rely on Professor Wellborn's argument that the Federal Rules of Evidence should be measured against the Rules Enabling Act requirement that procedural rules not abridge state-created rights. *See Federal Rules*, 55 Tex. L. Rev. at 400-01. Professor Wellborn's analysis of the relevancy rules, however, agrees with Judge Weinstein's conclusion that "truth-finding rules" do not have a substantive effect or infringe on state-created rights. He also concludes that such rules do not violate principles of federalism: "The purpose of the exclusion is to insure more accurate fact finding, not to promote some extrinsic social policy, and not to weight the scales in favor of one class of parties or another concerning any substantive right or duty intrinsically involved in the litigation." *Id.* at 395. *See Uniformity-Conformity*, 69 Colum. L. Rev. at 363.

Article VII applies across the board in all civil and criminal cases and favors neither plaintiffs nor defendants. No substantive rights are impaired by these rules, nor are conflicting state policies involved. The policy that the *Frye* Rule is intended to promote was explained by the Ninth Circuit:

> Expert opinion based on a scientific technique "is admissible if it is generally accepted as a reliable technique among the scientific community." . . . . We impose this requirement because such evidence "creates substantial danger of undue prejudice or of confusing the issues or of misleading the jury . . . because of its aura of special reliability and trustworthiness."

(Jt. App. at 238 (citations omitted)). *Frye*, therefore, is a truth-finding rule which does not abridge state-created rights and, thus, passes the Enabling Act test.

III. *FRYE* MAY BE SUSTAINED AS A JUDGE-MADE RULE INDEPENDENT OF THE FEDERAL RULES OF EVIDENCE UNDER *ERIE*

Petitioners alternately argue that the *Frye* Rule is a judge-made rule independent of the Federal Rules of Evidence which must fall under *Erie* because its application may lead to a different outcomes in certain cases. (Petitioners' Brief at 41.) The *Erie* doctrine is concerned only with substantive law: "Congress has no power to declare substantive rules of common law applicable in a State. . . . And no clause in the Constitution purports to confer such a power on the federal courts." *Erie*, 304 U.S. at 78.[6] This principle was reiterated by this Court in *Hanna*: "The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law." *Hanna*, 380 U.S. at 464.

The possibility that admission of evidence excluded by the *Frye* Rule could affect the outcome of a case does not render the Rule "outcome determinative" under *Erie*. In *Byrd*, this Court declined to require a federal court sitting in diversity to follow a state procedural rule mandating a bench trial where federal procedure required a jury trial. *Byrd*, 356 U.S. at 537. The Court recognized that application of federal procedure would affect the outcome:

> But there are affirmative countervailing considerations at work here. The Federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction.

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[6] The Court gave as examples "questions of purely commercial law . . . obligations under contracts . . . the liability for torts . . . . and the right to punitive damages." *Erie*, 304 U.S. at 75-76.

> An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence -- if not the command -- of the Seventh Amendment, assigns the decision of disputed questions of fact to the jury. *Jacob v. City of New York*, 315 U.S. 752 [(1942)]. The policy of uniform enforcement of state created rights and obligations, *see, e.g., Guaranty Trust Co. of New York v. York*, [326 U.S. 99 (1945),] cannot in every case exact compliance with a state rule -- not bound up with rights and obligations -- which disrupts the federal system of allocating functions between judge and jury.

Id. at 537-538.

Under *Byrd*, therefore, federal courts are authorized to fashion "truth-finding" rules governing the admission and exclusion of evidence. Such rules apply across the board to all types of actions -- they are not "bound up with" rights and obligations created by the states. The *Frye* Rule is such a rule; it conflicts with no articulated substantive policy.

Any possible differences in outcome in particular cases arise from a variation of approach as to the best way to control the admission or exclusion of expert testimony. It is essential to the dignity and integrity of the federal courts (in the absence of direction from Congress) that they have the final say over the rules that govern the integrity of their proceedings. *See Monarch Ins. Co. v. Spach*, 281 F.2d 401, 407 (5th Cir. 1960). Professor Degnan has stated that, consistent with *Byrd*, exclusionary rules of evidence are part and parcel of those rules that distribute the trial functions between judge and jury:

> These rules govern distribution of "trial functions between judge and jury." Just as federal law determines the type of issues which must be submitted to a jury, so also should federal law

> decide what evidence a jury is entitled to hear and consider in resolving the issues submitted to it.

Evidence Reform, 87 Harv. L. Rev. at 294. He concludes:

> Exclusionary rules, which have little purpose other than affecting outcome (in the sense of ascertaining the fact picture), are not affected by *Erie*. . . . The *Byrd* case specifically holds that allocation of function between judge and jury is a federal question, and exclusionary rules are part of that allocation.

Id. at 301.

Finally, this Court also noted in *Byrd* that whether a judge or jury decides the issue does not determine the outcome of a case with certainty. The same is true with the application of the *Frye* Rule. While admission of evidence found incompetent or prejudicial under *Frye* would get a plaintiff to the jury, assuming the case is decided by a rational jury, the outcome would still be the same. Here, as in *Byrd*, an exclusionary rule should not be considered outcome-determinative for *Erie* purposes. *See Byrd*, 356 U.S. at 540.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully Submitted,

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January 19, 1993